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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 815

HARVEY F. EUGE,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the St. Louis Court of Appeals of the State of Missouri.

HARVEY F. EUGE,
P. O. Box 1932,
St. Louis 18, Missouri,
Petitioner Pro Se.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Prayer	1
Reference to official reports	1
Statement of the grounds on which the jurisdiction of this court is invoked; date of judgment sought to be reviewed and the time of its entry	2
Date of order respecting petition for rehearing	2
Date of application for writ of certiorari and order to the Supreme Court of Missouri	2
Statutory provision believed to confer jurisdiction on this court	3
The question presented for review	3
Reasons relied on for the writ	3
State statutes involved	4
Amended information	6
Statement of facts	7
Argument and reasons for granting the writ	11
Conclusion	15
Appendix—Opinion of the Court of Appeals	17

Cases Cited.

Arnold v. U. S., 115 F. (2nd) 523	14
State v. Chaney, 349 S. W. 2nd 238	12
State v. Enge, 349 S. W. (2nd) 502	12
State v. Herman, 162 S. W. 2nd 873	11
State v. Kaufman, 308 S. W. (2nd) 333	13
State v. Martin, 536 S. W. (2nd) 536, Supreme Court, 1953	14
State v. McWilliams, 331 S. W. 2nd 610	12

Statutes Cited.

Missouri Laws 1917, p. 244 ..... 5, 6
Missouri Laws 1925, p. 191 5
Revised Statutes of Missouri, 1909, § 4765 4
Revised Statutes of Missouri, 1919, § 3552 4
Revised Statutes of Missouri, 1919, § 3553 5
Revised Statutes of Missouri, 1919, § 3554 5
Revised Statutes of Missouri, 1919, § 3555 6
Revised Statutes of Missouri, 1929, § 4304 4
Revised Statutes of Missouri, 1929, § 4305 5
Revised Statutes of Missouri, 1929, § 4306 5
Revised Statutes of Missouri, 1929, § 4307 6
Revised Statutes of Missouri, 1939, § 4694 4
Revised Statutes of Missouri, 1939, § 4695 5
Revised Statutes of Missouri, 1939, § 4696 5
Revised Statutes of Missouri, 1939, § 4697 6
Revised Statutes of Missouri, 1959:
Section 561.450 ..... 3, 4, 15
Section 561.460 ..... 3, 5, 9, 11, 13, 15
Section 561.470 ..... 3, 5, 9, 11, 13, 15
Section 561.480 ..... 3, 5, 15
28 U. S. C., 1257 (3) 3

Constitution Sited.

Constitution of the United States:
Fourteenth Amendment 3, 4, 11, 12, 15
Fifth Amendment 4, 11, 12, 15

Rule Cited.

Supreme Court of Missouri Rules, § 84.05 2

SUP CT OF MO RULE 8316

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STATE OF MISSOURI,
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PETITION FOR A WRIT OF CERTIORARI
To the St. Louis Court of Appeals of the State of Missouri.

Harvey F. Euge, petitioner, prays that a writ of certoriari issue ~~to the Supreme Court of Missouri~~ to review the opinion of the St. Louis Court of Appeals of Missouri rendered on the 15th day of May, 1962; and to take jurisdiction of the cause because a constitutional question was raised by defendant in the trial court.

REFERENCE TO OFFICIAL REPORTS.

The opinion of the St. Louis Court of Appeals of Missouri, defendant in error in the case of the State of Missouri v. Harvey F. Euge, plaintiff in error is reported in 359 S. W. (2nd) 369.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED; DATE OF JUDGMENT SOUGHT TO BE REVIEWED AND THE TIME OF ITS ENTRY.

The St. Louis Court of Appeals is the Court of last resort in misdemeanor cases. The opinion and judgment sought to be reviewed was dated 15th day of May, 1962.

DATE OF ORDER RESPECTING PETITION FOR REHEARING.

A petition or motion for rehearing or in the alternative for transfer of this cause to the Supreme Court of Missouri was timely filed on the 31st day of May, 1962, under Rule 83.16 of the Supreme Court of the State of Missouri which allows 15 days after the filing of the opinion for the filing of a motion for rehearing or transfer to said Supreme Court of Missouri. An order was entered on the 11th day of September, 1962 by the St. Louis Court of Appeals of Missouri denying said motion.

DATE OF APPLICATION FOR WRIT OF CERTIORARI AND ORDER TO THE SUPREME COURT OF THE STATE OF MISSOURI.

A petition or application for a writ of certiorari was timely filed on the 11th day of October, 1962 in the Supreme Court of Missouri under Rule § 84.05 of Supreme Court of Missouri, which allows 30 days time after the overruling of the motion for rehearing in the appellate court.

On the 14th day of November, 1962, the Supreme Court of Missouri entered its order denying the petition for an application for a writ of certiorari.

STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT.

The jurisdiction of this Court is invoked under the provision of 28 U. S. C., 1257 (3).

THE QUESTION PRESENTED FOR REVIEW

Were the Sections 561.450, 561.460, 561.470, and 561.480, Revised Statutes of Missouri, 1959, under which defendant-petitioner was prosecuted constitutional; and the amended information filed pursuant thereto and the evidence adduced by the State sufficient by which defendant was tried and convicted in compliance with the 5th and 14th amendments of the Constitution of the United States of America?

REASONS RELIED ON FOR THE WRIT.

A. The provision among other things of the 5th amendment of the Constitution of the United States of America, is

> "No person shall be deprived of life, liberty, or property without due process of law."

That the State in the prosecution of the defendant-petitioner under the sections of the Statutes, §§561.450, 561.460, 561.470, and 561.480, the amended information, and evidence was a violation and not in compliance with the provisions of this amendment.

B. The Fourteenth Amendment to the Constitution of the United States of America, among other things, reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

And that by reason of said amendment to the Constitution, the Courts of the State of Missouri, the State Legislatures, and the law enforcing authorities are required among other things to protect the rights and property of its citizens and be compelled to comply with the same constitutional requirements as are imposed on federal officers.

STATE STATUTES INVOLVED.

That the Statutes in question which the defendant-petitioner deems in conflict with the provisions of the 5th and 14th amendments to the Constitution of the United States of America are herein set forth as follows:

Section **561.450**: Confidence Game or Fraudulent Checks.

Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation, or statement or pretense, or by any other means or instrument or device, commonly called "the confidence game," or by means or by use, of any false or bogus check or by means of a check drawn, with intent to cheat and defraud, on **a bank in which the drawer of the check knows he has no funds** or by means or by use, of any corporation stock or bonds or by any other written or printed or engraved instrument or spurious coin or metal, shall be deemed guilty of a felony and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding **seven years.** (R. S. 1939, § 4694); 1929, § 4304; 1919, § 3552; 1909, § 4765.

Section **561.460**: Checks or Drafts Drawn When Funds **Insufficient**.

Any person who, to procure any article or thing of value or for the payment of any past due debt or other obligation of whatsoever form or nature or who, for any other purpose shall make or draw or utter or deliver, with intent to defraud any check, draft or order, for the payment of money, upon any bank or other depositary, knowing at the time of such making, drawing, uttering or delivering, that the maker or drawer, has not sufficient funds in or credit with, such bank or other depositary, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of misdemeanor, and punishable by imprisonment for not more than one year, or a fine of not more than one thousand dollars, or by both fine and imprisonment. (R. S. 1939, § 4695) (1929, § 4305); 1919, § 3553; from Laws 1917, p. 244; Laws 1925, p. 191.

Section **561.470**: Intent to Defraud, How Established.

As against the maker, or drawer thereof, the making, drawing, uttering, or delivering of a check, draft, or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in or credit with, such bank or other depositary, provided such maker or drawer shall not have paid the drawee thereof, the amount due thereon, together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee. (R. S. 1939, § 4696, A. 1949, H. B. 2151), R. S. 1929, § 4306, 1919, § 3554.

Section **561.480**: Defining the Word Credit.

The word "credit" as used in sections 561.460 to 561.480, shall be construed to mean an arrangement or understanding with the bank or depositary, for the payment of such

check, draft, or order. (R. S. 1939, § 4697) (1929, § 4307); 1919, § 3555; from Laws 1917, p. 244.

The information upon which defendant-petitioner had been tried and convicted is as follows:

On page 28 of the Transcript of Record.

AMENDED INFORMATION.

State of Missouri, } ss.
County of St. Louis. }

In the Circuit Court of the County of St. Louis, State of Missouri.

September Term, 1960.

State of Missouri, vs. Harvey F. Euge. } Charge: ISSUING CHECK INSUFFICIENT FUNDS

Barbara Kurtz, Assistant Prosecuting Attorney, within and for the County of St. Louis, in the State of Missouri, acting herein under her oath of office and upon her best information, knowledge and belief, comes now into Court and Amended Information makes as follows:

That on the 16th day of July in the year 1958, at said County of St. Louis, and State of Missouri, one Harvey F. Euge did then and there wilfully and unlawfully and ~~feloniously~~ with the intent to cheat and defraud, obtain from the Lemay Bank and Trust Company monies of the value of $250.00, lawful money of the United States, by means and use of a certain check drawn upon a bank, to-wit: Chippewa Trust Co., a banking corporation of the State of Missouri purported to be drawn by one Harvey F. Euge and in which said bank the said Harvey F. Euge

well knew there were no funds to cover the payment of said check upon its presentation, or any account in and under the name and signature set out on said check; said check being of the tenor, as follows:

"Chippewa Trust Company 4–109 156

810

St. Louis, Missouri, 7/16 1958 No. B

Pay to the Order of Harvey F. Euge $250

Two Hundred and Fifty .....no/100 Dollars

For ..... /s/ Harvey F. Euge"

contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

.....

Assistant Prosecuting Attorney
County of St. Louis, Missouri.

STATEMENT OF FACTS.

The defendant (petitioner) Harvey F. Euge, a citizen and resident of the City of St. Louis, State of Missouri, had a commercial account commonly known as a checking account with the Lemay Bank and Trust Company, a corporation located in the County of St. Louis, Missouri.

That he was engaged as a merchant at the time of the transactions herein involved; and that he had purchased a bill of goods on consignment from a firm known as the Atomic Fireworks Company, Incorporated. That a dispute arose between the said defendant (petitioner herein) and the said Atomic Fireworks Company on account of said merchandise. That on account of said dispute payment for said merchandise was not made; that, thereafter a suit for debt and attachment was instituted by the said Atomic Fireworks Company against this defendant in the Magis-

trate Court of the County of St. Louis, Missouri; and that service of summons in said suit and writ of attachment was not had upon this defendant and that a summons or a writ of garnishment was served upon the bookkeeper of the said Lemay Bank and Trust Company. That before the suit on account and attachment was heard the defendant, Harvey F. Euge, had attempted to withdraw some of his money by check from the said Lemay Bank and Trust Company, a Corporation. That said Bank refused to honor said check on account of said garnishment.

That defendant thereafter on the 16th day of July, 1958, used the device of writing a check drawn upon a bank known as the Chippewa Trust Company, a Corporation, in the City of St. Louis, Missouri, where he had no account at the time, in an effort to obtain some of his money and that he presented same for payment to the said Lemay Bank and Trust Company, which honored the same by giving the amount stated therein in cash to defendant.

That defendant used this device with no fraudulent intent and did so with the full knowledge that when said check would be dishonored by the Chippewa Trust Company, the same would be charged against his account by the Lemay Bank and Trust Company and by so charging said check against defendant's account, the Lemay Bank and Trust Company would suffer no loss of any of its own funds.

That it was the custom, practice and procedure of the banking institutions in and about the City of St. Louis, Missouri, and the County of St. Louis, Missouri, including the banks herein named, to charge off or against the account of the depositor among which was the defendant, any bills, drafts, or checks which have been dishonored by any banking institutions.

That this practice was known to the defendant.

That from and since the 16th day of July, 1958, to the time of the trial and conviction of the defendant (petitioner) to the date of the opinion of the St. Louis Court of Appeals of Missouri, including the date of the filing of the application of the present writ of certiorari to the Supreme Court of the United States of America, the said suit on account and attachment against defendant was never prosecuted.

That no judgment was had against defendant or any change of title to defendant's money in the Lemay Bank and Trust Company was affected on the date of said trial to the present time of the application of this writ to the Supreme Court of the United States of America.

That the defendant was tried by an amended information under sections 561.460 and 561.470, Missouri Revised Statutes 1959, charging defendant with issuing check of insufficient funds. Which charge was a misdemeanor.

That defendant was tried and convicted by a jury and fined the sum of One Thousand Dollars ($1,000.00) and costs on the 10th day of January, 1961, in Division Number One of the Circuit Court of the County of St. Louis, State of Missouri.

That defendant appealed said conviction to the St. Louis Court of Appeals of Missouri on the 20th day of January, 1961, which is the highest appellate court having jurisdiction of misdemeanors.

That said appellate court had affirmed the conviction of defendant in the Circuit Court of the County of St. Louis, Missouri, on the 15th day of May, 1962; that thereafter a timely motion for transfer to the Supreme Court of Missouri was filed and overruled on the 11th day of September, 1962.

That a timely application for a writ of certiorari was filed by defendant in the Supreme Court of the State of Missouri, the same being the highest appellate tribunal of said state on grounds that a constitutional question among other things was involved, which contention was overruled by said Supreme Court of Missouri on the 14th day of November, 1962.

That the effect of the denial of said application for said writ of certiorari to said Supreme Court of Missouri left standing against defendant a final judgment of conviction with the penalty of a fine of One Thousand Dollars ($1,000.00) and costs against him.

ARGUMENT AND REASONS FOR GRANTING THE WRIT.

The reason for the granting of a Writ of Certiorari in this case is dictated from the provisions of the 5th Amendment and Section One of the 14th Amendment to the Constitution of the United States of America.

That the information was fatally defective because it did not fully conform with the statute in that it omitted words "Credit" ((arrangement or understanding with said bank;" and because the charge differed with the charging portion of said information and the evidence adduced was at variance with the charge.

That under the evidence no crime was committed because the state failed to show and prove that the Lemay Bank & Trust Co. suffered the loss of any of its property or funds on the date of the alleged offense. State v. Herman, 162 S. W. 2nd 873.

That Section 561.460 and 561.470, Revised Statutes of Missouri, 1959, under which defendant was tried and convicted prescribes and invokes the presumption of guilt upon defendant.

That said statute conflicts with and destroys the presumption of innocence.

That said statute shifts the burden of proof from the State and puts the burden of proving innocence on defendant and relieves the State of its burden to prove defendant's guilt.

That the sections of said statute are unconstitutional and deprive defendant of due process of law and in violation of the 5th and 14th amendments to the Constitution of the United States of America.

That the Trial Court deprived defendant of his defense by refusing his instructions to the jury upon his theory of his defense and by forcing defendant to trial without

counsel; and that both the St. Louis Court of Appeals and the Supreme Court of the State of Missouri were in error in affirming defendant's conviction. Their decisions were in violation of the 5th and 14th amendments of the Constitution of the United States of America. **State v. Chaney**, 349 S. W. 2nd 238; **State v. McWilliams**, 331 S. W. 2nd 610.

That defendant was not given five days' notice of a dishonor of said check pursuant to section Number 561.470.

In the case of **State v. Euge**, 349 S. W. (2nd) 502, the Court of Appeals was in error in presuming the receipt of a letter without proof or evidence that such letter was in fact received by the alleged addressee to bolster the state's thgory on the presumption of guilt. The court said, L. C. 506, pt. 9 to 12:

> "From the opening and closing remarks of counsel for defendant, as well as his line of cross-examination of the State's witnesses, we gather that defendant's claim of the insufficiency of the evidence was threefold: (1) that there was no evidence that the defendant received a notice that his check had not been paid; (2), that there was no evidence of an intent to defraud; and (3), that no offense under Section 561.460 was committed because at the time of the transaction defendant had $10 in deposit with the Association which it could have used to reimburse itself when his check was returned unpaid. Of course, there was no direct evidence that the letters sent by the Association were received by the defendant, and the officer who mailed the second letter was unable to produce a registry receipt. But the evidence that such letters were mailed to defendant at his postal address raised a prima facie presumption that they were received by him. Armour & Co. v. American Automobile Ins. Co., 336 Mo. 551, 80 S. W. 2d 685; Clark v. Cole County, 272 Mo. 135, 197 S. W. 905. As

to the element of fraudulent intent, under Section 561.470 the State's proof that the defendant failed to pay the check within five days after being notified that the Lindell Trust Co. had not paid it was prima facie evidence of the defendant's intent to defraud and of his knowledge of insufficient funds in or credit with such trust company. State v. Taylor, 335 Mo. 460, 73 S. W. 2d 378; State v. Kaufman, supra."

That Sections 561.460 and 561.470 of the Revised Statutes of Missouri, 1959, was construed in the case known and styled **State v. Kaufman**, 308 S. W. (2nd) 333, sustained the validity of the said statute. The Court held, l. c. 339 under pt. 9:

"In this case the State had the right to rely on the statutory presumption of fraudulent intent and knowledge on the part of the defendant that he had insufficient funds on deposit or credit with the bank, inasmuch as defendant failed to pay the bank within five days after he was notified the check was not paid by the bank, § 561.470; State v. Taylor, 335 Mo. 460, 73 S. W. (2nd) 378, 95 A. L. R. 476. Under the statute defendant's failure to pay within five days constituted prima facie evidence, not only of the intent to defraud, but also prima facie evidence of defendant's knowledge of the insufficiency of the funds in, or credit with the bank. The gravamen of the offense charged is intent to defraud and knowledge of the insufficiency of the funds in, or credit with, the bank and because it is difficult to prove this intent and knowledge, the law makes the failure to pay the check within five days prima facie evidence of intent to defraud and the requisite knowledge. This statute has obviated the duty of the state to directly prove the intent and knowledge. The State having shown that the defendant did not pay the check within five days after notice of dishonor, has met the burden of proving the re-

quired intent and knowledge and, therefore, has proved that defendant had knowledge of insufficient credit with the bank."

That defendant raised this question on his trial and on his appeal to the St. Louis Court of Appeals and to the Supreme Court of Missouri to no avail.

That the instant case is of vital interest and of great import to the Citizens of the State of Missouri, because the aforementioned statutes and the case of State v. Kaufman, supra, construing same approves the destruction of the traditional rights of a defendant to his presumption of innocence and if permitted to stand would completely destroy all the rights, immunities and protection of the law of the land as was once known to the citizenry of the United States of America and turn the State of Missouri into a totalitarian state.

A Statutory offense cannot be established by implication, and there can be no constructive offense, and before an accused can be punished, his act must be plainly within the statute. **Arnold v. U. S.**, 115 F. (2nd) 523.

A presumption of intent in a criminal prosecution does not arise unless it is predicated upon an intentional act. Pt. 1 of **State v. Martin**, 536 S. W. (2nd) 526, Supreme Court, 1953.

It has been defendant's (petitioner's) contention throughout the entire criminal proceedings and still remains that no crime in fact was committed by defendant.

That title in and to defendant's (petitioner's funds held by the said Lemay Bank and Trust Company belonged to him to the exclusion of all others; and that said Bank had no legal right to withhold his money from him and that said Bank suffered no loss of its own funds, money, or property at any time throughout the entire proceedings up to and including this present application to the Supreme Court of the United States of America.

That the trial court forced defendant to trial without affording him the right to secure counsel.

That the trial court denied defendant his right to present his defense to the jury by refusing his instructions on his theory of his defense.

That the information was fatally defective, the proof at variance with the charge.

The claim of unconstitutionality of the sections of the statutes set forth.

That the said sections of the statutes mentioned were in violation of the 5th Amendment and 14th Amendment, Section One.

CONCLUSION.

It is respectfully submitted that the St. Louis Court of Appeals of Missouri was in error when it affirmed the conviction of defendant-petitioner obtained in the Circuit Court of the County of St. Louis, Missouri upon the amended information and evidence under sections 561.450, 561.460, 561.470 and 561.480 of the Missouri Revised Statutes, 1959, as heretofore set forth; because the said sections of the statute are unreasonable, invalid, irrational, and unconstitutional in that it prescribes a presumption of guilt of a defendant upon the issuance of a check in the manner set forth without requiring the state to establish and prove criminal intent to defraud and produce evidence to establish defendant's guilt; and shifts the burden of proof upon the defendant to prove his innocence; that the Supreme Court of Missouri was in error for denying defendant's application for a writ of certiorari to its court.

It is further submitted that no crime in fact was committed by the defendant at the time of his conviction and trial because there was no evidence adduced by the State to prove that the said Lemay Bank and Trust Company suffered a loss of any of its money or property by and

through any act of defendant or by the device used by him.

That the check dishonored could have been used and probably was used as a set off or charge off or deducted from defendant's own funds in said bank without suffering a loss of its own funds.

That defendant was convicted upon the theory alone that the bank may or might at some future time suffer a loss of its funds on account of said check.

That before any criminal prosecution was instituted against defendant, it was the duty of the State to determine the status of the attachment suit then pending and whether or not there was any judgment against defendant applicable to the funds of defendant in the Lemay Bank and Trust Company and whether or not the said bank suffered the loss of any of its own funds, and since there was no such showing by the State; and since defendant's creditor the Atomic Fireworks, Inc. obtained no judgment against the funds of the defendant in said bank, the Lemay Bank and Trust Company was without any right to withhold any of defendant's money and he had a right to use any device short of force or violence to obtain his own property. And therefore his conviction was invalid as a matter of law and in violation of the 5th and 14th Amendments to the Constitution of the United States of America. And that this writ of certiorari issue and upon the issuance thereof this court quash said ruling by the St. Louis Court of Appeals of Missouri, reverse its judgment and defendant be discharged; and go hence without further delay.

Respectfully submitted,

HARVEY F. EUGE,
P. O. Box 1932,
St. Louis 18, Missouri,
Petitioner Pro Se.

APPENDIX.

OPINION OF THE COURT OF APPEALS.

In the St. Louis Court of Appeals.

April Session, 1962.

State of Missouri,

Plaintiff-Respondent,

vs.

No. 31,058.

Harvey F. Euge,

Defendant-Appellant.

Appeal from the Circuit Court, St. Louis County.

Hon. Virgil A. Poelker, Judge.

Opinion filed May 15, 1962.

Defendant was found guilty of issuing an insufficient funds check (§ 561.460, R. S. Mo. 1959), and his punishment was fixed by the jury at a fine of $1,000.00 and costs. His appeal was submitted during our March docket. We have not been favored with briefs by the defendant nor by the State, and therefore the record and the assignments of defendant's motion for new trial properly preserving the trial court's alleged errors are for our review. Rules 27.20, 28.02, 28.08, V. A. M. R.

Defendant conducted his own defense at the trial, filed his own after trial motions, and typed the transcript himself. His after trial motions, which we will consider collectively as a motion for new trial, present thirty-five assignments of alleged error, the vast majority of which are too general to comply with Rule 27.20, V. A. M. R. They are vague, indefinite, rambling, and repetitious, and preserve nothing for our review. However, we have ascertained that defendant attempts to raise certain constitutional questions and attacks the information. He also alleges as reversible error the overruling of his plea in abatement, the trial court's action in going to trial over

his objections and in denying him time to apply for a writ of prohibition, the denial of his request for a mistrial, the giving of those instructions given by the court and the refusal to give certain instructions he offered. In addition, the defendant questions the sufficiency of the state's evidence to support the verdict.

The defendant was convicted of a misdemeanor, but if a question involving construction of the Constitution is properly presented, jurisdiction would be in the Supreme Court of this state, Article V, § 3, Constitution of Missouri. Defendant alleges the trial court erred "* * * in refusing to submit any of defendant's instructions to the jury, and in doing so denied to him the equal protection of the laws as provided by * * *" the Constitutions of Missouri and of the United States, and of the amendments thereto. There are also two references to "* * * the presumption of innocence * * *." These allegations are insufficient to divest this court of jurisdiction, State v. Brookshire, Mo., 325 S. W. 2d 497 (transf. to Mo App., 329 S. W. 2d 252); State v. Euge, Mo. App., 349 S. W. 2d 502 at [1-3], pp. 503-504.

The attacks which the defendant makes upon the information are without merit. It plainly charges that on July 16, 1960, in St. Louis County, the defendant, with intent to cheat and defraud, obtained $250.00 from the Lemay Bank and Trust Company, by issuing his check drawn upon the Chippewa Trust Company, knowing that there were no funds in the latter to pay the check upon its presentation. The information follows the wording of the statute and alleges all the facts necessary to bring the defendant within the provisions thereof. State v. Kaufman, Mo. App., 308 S. W. 2d 333.

The "plea in abatement" which the defendant urges the trial court should have sustained was originally filed in another trial, arising out of this same occurrence, which resulted in a hung jury. This matter also brings into

consideration the defendant's contentions of error with regard to the trial court's action in proceeding with the trial on September 26th, 1960, over his objection. The transcript which the defendant prepared, and which the State, by the Prosecuting Attorney for St. Louis County, approved, contains two recitations of what happened on the day of, and just prior to, trial. The record proper states, and defendant admits it so states, that on the 20th of September, 1960, the defendant was appearing on another cause before the trial court and was informed that the cause would be tried September 26th. The record proper also sets out that on that day, "Defendant appears in person and as attorney pro se also announces ready for trial. Examination of jurors on voir dire begun, progressed and concluded, at the hour of 3:10 P. M. 18 qualified and competent jurors are found. State and defendant granted till tomorrow morning at 9:30 A. M. to make their respective challenges." However, defendant has also included in the transcript what he contends to be "* * * the true record as it happened and in direct conflict to the record as made." In that portion of the transcript, he contends he orally objected to trial on the 26th because the case had been previously continued until October 17th; that he filed the amended plea in abatement which he had filed in the case that resulted in a hung jury; and that he was "* * * coerced into trial of the cause without a hearing on his plea of abatement as filed." Our concern that the defendant not be penalized because he has no counsel cannot be extended to accepting a version of what happened that is not only admittedly not included in the official record of the proceedings but actually contradicts that record. Defendant does not allege that his defense was in any way hampered by this action of the trial court except that he wanted to file certain pleas, such as in abatement, which the record discloses he in fact did file on the 27th of September in his

motion to discharge the jury and declare a mistrial for lack of jurisdiction in the trial court. A perusal of this motion discloses that it is based on the contention that the cause was improperly heard on that day, a matter above disposed of adversely to defendant, and upon the contentions that: (1) until the plea in abatement had been ruled, the court could not continue; and, (2) that if the plea in abatement was overruled, defendant could appeal that ruling and thus prevent the trial from proceeding. These contentions are without merit. The record discloses that the trial court did in fact overrule this "Plea in Abatement." Moreover, although in his motion for new trial and in the notice of appeal he has filed, the defendant seeks to appeal this specific action of the trial court, he cannot do so. We specifically ruled this same point adversely to the defendant in State v. Euge, Mo. App., 349 S. W. 2d 502 at [5], page 504. Neither is there any provision in the Criminal Code to prevent the trial court from proceeding when, to be doubly sure it was proceeding properly, it overruled such a motion. In State v. Euge, Mo. App., 349 S. W. 2d 502, the defendant had failed to assign as error in his motion for new trial the overruling of his "Plea in Abatement." Evidently learning from experience, defendant included such an assignment of error in the motion for new trial in the instant case. We pass therefore to a consideration of the merits of such an assignment of error.

The "Amended Plea in Abatement" alleges that "* * * a few days prior * * *" to the date on which the check incident occurred, a magistrate action was filed by Atomic Fireworks, Inc. of Missouri; hereinafter referred to as Atomic, against the defendant upon a debt that company alleged defendant owed it; that this action was by attachment and a "* * * writ of garnishment * * *" was issued therein and served upon the Lemay Bank and Trust Company; that defendant was not aware of this proceeding;

that the affidavit upon which the magistrate issued the attachment was defective on its face and not in accordance with "Section 521.060 of the R. S. of Missouri, 1949 * * *"; that defendant was not personally served nor was any other service had upon him in the action instituted by Atomic; that "* * * there was defective service upon the said Lemay Bank and Trust Company, as garnishee; * * *" that the petition in the action filed by Atomic failed to state a cause of action against the defendant in that it failed to allege "* * * the place of and the date, and time, and the manner in which the said debt was due * * *" and further failed to state where plaintiff therein or this defendant resided, "* * * or the circumstances by which the said debt was contracted or any fact giving said court legal and valid jurisdiction thereof." The "Amended Plea in Abatement" then alleged that the magistrate court in the Atomic case had no jurisdiction to proceed in that case and therefore the Lemay Bank and Trust Company "* * * was under no legal duty or obligation to respect the said attachment and garnishment or fear any consequences therefrom * * *" In short, the defendant sought to try the validity of the attachment issued in the Atomic suit in this action, and contends it was prejudicially erroneous not to do so.

The amended plea in abatement filed in the action which resulted in a hung jury was verified by defendant's affidavit. See § 545.830, R. S. Mo. 1959. The function of a plea in abatement is to bring to the court's attention matters outside the record which render the indictment or information invalid, State v. Hughes, Mo. App., 223 S. W. 2d 106 at [4-7], page 109. For example, in State v. Bright, Mo. App., 263 S. W. 559, the defendant set up in such a plea the fact that she was compelled to appear and testify before the grand jury which later indicted her without having been advised that she was being investigated or the nature of the inquiry. The evidence thus

procured was considered and relied upon in securing the indictment against her. The distinction between a matter of that nature, which directly attacks the validity of the indictment, and the matters contained in this "Plea in Abatement" is obvious. In the instant case, the best that can be said of the matters pleaded in the "Plea in Abatement" was that it constituted a defense to Atomic's action. The allegations therein in no way rendered invalid or void this information. The trial court properly overruled what defendant designated a plea in abatement.

There is no merit in defendant's contention that he should be granted a new trial because the trial court refused to allow him a continuance to apply to this court for a writ of prohibition. It would be ridiculous to give him a new trial so that he could present to us in an application for such a writ the very contentions as to lack of jurisdiction he stated in his "Motion to Discharge Jury and Declare a Mistrial for the Lack of Jurisdiction of This Court to Proceed in This Cause," which he alleges the trial court erroneously overruled. These matters have now been presented to us by his allegations in his motion for new trial, and all are herein ruled adversely to defendant.

We now come to a consideration of those allegations of error contained in the defendant's after trial motions that require a consideration of the evidence. Mr. Wind, president of Leimay Bank, testified that Euge had had an account at the bank in the past; that the bank was served with a garnishment with respect to that account and a writ of attachment on Friday, July 11, 1958; that at that time the balance in the defendant's account was $375.42; that he talked with the defendant on Monday, July 14th, showed him the papers served on the bank and explained to him that for this reason the bank would not honor any items drawn against the account. On cross-examination he testified the balance in the account as of trial (Sep-

tember 27, 1960) was $500.00; that the bank was advised by its counsel to honor the writ of attachment, although he did not know what investigation of the validity of the attachment was made, if any; and that the bank has a charge-back system whereby any bad check would be charged against the customer's account. The defendant repeatedly cross-examined the witness on whether or not he knew that "* * * the garnishee's duty is to definitely check into such an attachment?" and other matters pertaining to the validity of the attachment. In view of our ruling herein upon the attempt to plead the invalidity of the attachment as a plea in abatement, it will not be necessary to include that testimony.

Mrs. Murray testified that she was the drive-in window teller at Lemay Bank on the occasion when the defendant presented the check drawn on the Chippewa Trust Company, and that he took $171.13 of the $250 thereof in cash, and deposited $78.87. At the opening of his cross-examination of this witness, the defendant admitted that he issued the check referred to. Mrs. Murray's further testimony was that defendant told her he had over the amount of the check on deposit; that in reliance thereon she cashed the check; and that defendant in no way prevented her from calling the Chippewa Bank but that she did not do so.

Mr. Wind then resumed his testimony and stated that the check was returned to the Lemay Bank from the Chippewa Bank marked "No account"; that the tellers may not have been "specifically" informed of the attachment but the account was "flagged"; that this means that a warning was put on the account.

Sam Antonacci testified that his duties at the Chippewa Bank were to supervise the posting of all checks and deposits, take care of checks returned for various reasons, and handle the general bookkeeping of that bank; that the defendant opened an account at the Chippewa Bank

in May of 1952; that on September 16, 1957 this account had a deficit of 62¢, and the account was closed as of that date; that sometime later they received a deposit of $4.00 in cash which the officers of his bank instructed him to return to the defendant by "treasurer's check" with the information that they did not want defendant's account; that this was done by a letter accompanying the check, and the witness identified the check for $4.00 cashed by defendant, and a copy of the letter sent to him. On cross-examination this witness testified that the general banking procedure as to charge-offs was that such are not done when the funds in the account are attached, or where the charge-off would result in an overdraft.

Robert G. Burriage testified that in 1958 he was an Assistant Prosecuting Attorney for St. Louis County and that he represented the state at the defendant's preliminary hearing; that the defendant then testified that he cashed this check at Lemay Bank, received $171 and some odd cents in cash, and deposited the remainder, and that he then knew he had no funds in the Chippewa Trust Company. Cross-examination was taken up with defendant presenting his contention that since he had a deposit in the Lemay Bank sufficient to cover this check, he could not be defrauding that bank which would charge the check against his own money which it held, asking the witness whether or not in his opinion as a lawyer this contention was correct, and with the witness's explanation that it was not, for the reason that defendant had obtained money that the bank was not entitled to pay out because of the attachment and might have to replace and pay to Atomic. The matter is not presented for our ruling, but the entire line of questioning was improper, over the repeated valid objections interposed by counsel. Defendant did not ask questions but made abstract statements, and attempted to argue legal conclusions with the witness. The same matters were repeated over and over again.

The State having rested, and the defendant's "Motion for Acquittal" having been overruled, the defendant presented the clerk of the magistrate court of Jefferson County as his first witness. By this witness and over the objections of the State, the defendant had read into the record the minute entries in Atomic's action against the defendant in which the attachment heretofore referred to was issued. It is not necessary to go into these more fully than to state that by the date of trial the circuit court of that county had issued a preliminary writ of prohibition directed to the magistrate court of that county, and there the matter rests.

Jacob Pfeiffer, deputy constable, testified that he did not know the defendant personally and if he had served any papers in Atomic's case on defendant, did not remember it.

Fred J. Hoffmeister, attorney for Lemay Bank, was called as a witness and testified that he examined the attachment served on that bank and gave the bank his opinion as to it, but refused, on the grounds of privilege, to relate what advice he gave the bank with regard to the attachment. However, he later gave as his opinion that there were no irregularities appearing on the face of the paper served on the bank.

The defendant then took the stand. He testified that when he was informed by the Lemay Bank of the attachment, "* * * I looked at it and I told them that there was no service on me at the time and that it was of no force and value, which I knew because of previous study * * *." He further testified that he cashed this check "* * * with the intention that it was the same as and no different than a Lemay Bank check that would be directly charged back against my account and I did that to gain the rightful possession of my money and my property that the Lemay Bank was withholding from me without any due process." On cross-examination he verified Wind's testimony that

he was told of and even shown the attachment; that he knew he had no account at the Chippewa Trust; and that it was his thought that since he had an account in the Lemay Bank he could cash a check at that Bank drawn on any bank because "* * * it would have the same force and effect, it would be charged off as that check, as their check." The defendant was then asked if he had ever before been convicted of issuing bad checks and testified that he had been convicted "On the other half of this account, which is on appeal in this court.

Q. Have you ever been convicted before? A. There was one in the City on an insufficient fund check, which is also on appeal in the St. Louis Court of Appeals." The transcript at this point contains this notation "(appears the court reporter omitted something here; to be added in a supplemental transcript if anything.)" No objection is shown in the transcript as prepared and filed by the defendant nor was any supplemental transcript filed. Accordingly, the allegation of error that the trial court failed to direct a mistrial because of the action of the state in introducing such matters into the trial need not be ruled upon.

This concluded the evidence, and upon overruling the "Defendant's Motion for Acquittal," the trial court instructed the jury. We find no error in the instructions given by the court. Instruction No. 1 required the jury to find "* * * beyond a reasonable doubt * * *" that the defendant "* * * unlawfully and knowingly * * *" in order to obtain monies in the value of $250.00, with intent to defraud, uttered this check, and further required them to find that at the time of utterance defendant knew he had "* * * no sufficient funds in or credit with said Chippewa Trust Company * * *" and upon so finding authorized a verdict of guilty and punishment as stated in the statute, and "* * * unless you find all the facts to be you will acquit the defendant." There is no doubt that this

instruction required the finding of all the required elements of the offense. Neither can there be any doubt but the submissions were amply supported by the evidence, and that allegation of error is ruled adversely to appellant.

Instruction No. 2 was the usual and repeatedly approved "presumption of innocence" instruction, State v. Nelanti, Mo., 331 S. W. 2d 542. Instruction No. 3 was a cautionary "credibility of the witnesses" instruction, correctly stating the law thereto. Instruction No. 4 informed the jury that "* * * argument of counsel is for the purpose of aiding you to reach a proper verdict by refreshing in your minds the evidence * * *" but cautioning the jury that it was their duty to be governed by the law as given them by the court in the instructions, and "* * * to be governed in your deliberations by the evidence as you understand it * * *." Instruction No. 5 required that all jurors agree to the verdict, and that the foreman sign it. It was not erroneous to give these instructions. We might here point out that this transcript fails to disclose any objection by the defendant to the giving of these instructions, State v. Rush, Mo., 286 S. W. 2d 767; State v. Lawson, Mo., 290 S. W. 2d 84; but we have nevertheless reviewed them.

The trial court refused to give Instruction A, which stated that the State must prove beyond a reasonable doubt that a five-day notice that his account was insufficient was given to the defendant prior to his arrest, and directed acquittal, absent such a finding. In State v. Kaufman, supra, this court held that proof of the giving of this notice provided for by § 561.470, R. S. Mo. 1959, is not an essential element of an offense under § 561.460, supra, but that failure to give the notice would prevent the State from availing itself of the presumption of intent created by § 561.470, supra. Under the evidence in this case, there was no need to rely upon the presumption. In any event, even payment within the five days (an event that did not here occur) would only have abrogated the

presumption. It would not have constituted a defense to the charge requiring, as this instruction stated, acquittal. State v. Kaufman, supra.

Instructions B, C, F, and G, presented the "charge off" theory defendant attempted to present throughout these proceedings, and also the theory that the attachment was invalid. Each of these instructions directed acquittal on those theories, "* * * notwithstanding the fact that defendant knew that he did not have any funds or credit with the Chippewa Bank and Trust Company * * *" and also notwithstanding the fact of the attachment on his funds in the Lemay Bank. We think it clear from what has been said herein that such an instruction would have amounted to an adoption by the court of defendant's defenses as a matter of law, and these instructions were correctly refused. Instructions D, E, and H were cautionary instructions that perhaps could have been given, although they were not as clearly stated as those covering the same matters given by the court, but it is not reversible error to refuse such instructions when the matters they present were covered by other instructions correctly stating essentially the same matter. We find no error in the trial court's actions with regard to the giving and refusal of these instructions.

We find no reversible error in this record. The judgment should be affirmed. The Commissioner so recommends.

Robert G. Brady,
Robert G. Brady, Commissioner.

Per Curiam:

The foregoing opinion of Brady, C., is adopted as the opinion of the court. The judgment is affirmed.

Lyon Anderson, Presiding Judge, concurs.

John J. Wolfe, Judge, concurs.

E. M. Ruddy, J., not participating.

Office-Supreme Court, U.S.
FILED
MAY 2 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 815.

HARVEY F. EUGE,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

MOTION FOR LEAVE TO FILE PETITIONER'S PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI OUT OF TIME

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Petitioner Pro Se.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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OUT OF TIME

Comes now the petitioner and respectfully moves this Honorable Court to permit the filing of petitioner's petition for rehearing of order denying petition for writ of certiorari NUNC PRO TUNC; or for leave to file the said motion for rehearing out of time for the following reasons, to wit:

1. That petitioner first received notice from the Clerk of the Supreme Court of the United States that said motion was out of time at 2:45 P. M. on the 30th day of April, 1963, which was dated and postmarked April 29, 1963.

2. That this was a great surprise to petitioner for he had not received the return receipt of the certified mail Number 866784.

3. That petitioner exerted all due diligence and efforts at his command to have the said motion printed in due time; that due to the heavy run of business by the printer, the printing of said copies of said motion was delayed thereby.

4. That immediately after the printing of said motion for rehearing and timely service of a copy thereof to the Prosecuting Attorney's Office of the County of St. Louis, Missouri, petitioner personally traveled a distance of about 15 miles out of his way to have the post office branch at the Lambert Air Field Airport located in the County of St. Louis, Missouri, to receive the parcel containing the 40 copies of said motion for rehearing for Air Mail Delivery, Washington, D. C., in time for said motion to arrive in the Office of the Clerk of the Supreme Court of the United States within the last day of the time allocated for the filing of said motion for rehearing.

5. That the said parcel of mail containing said 40 copies of said motion for rehearing was personally delivered for mailing by petitioner at the AIRPORT MAIL FACILITY or "Pouch Room" at Lambert Air Field of St. Louis Missouri Post Office as evidenced by certified mail receipt number 866784; which is herewith attached and made a part of this motion; at 8:30 P. M. on Thursday, April 25, 1963 and immediately deposited in the designated pouch

in ample time to be on flight Number 448 leaving at 10:20 P. M. expected to arrive in Washington, D. C. on the 26th day of April, 1963 at approximately 2:31 A. M. to be delivered to the said Clerk's office the same day.

6. That earlier in the day, petitioner had called the airmail section of the Main Post Office, located at 18th and Market Streets in the City of St. Louis, Missouri, about 15 miles from the airport facility and was informed by the clerk thereof that there were two flights to Washington, D. C.; one, at 8:44 P. M.; and another, at 9:05 P. M.

7. That at the Airport Facility he was informed that flight Number 448 would leave at 10:20 P. M. and would arrive in Washington, D. C. at 2:31 A. M. for regular delivery on the same day, by another clerk of the post office who was well known to petitioner to be a postal employee of long standing and efficient in his handling of the airmail flight schedules when petitioner, many years ago, was a temporary postal employee as an interstation dispatch driver, and had many times made the same airmail runs from the Main Post office at 18th and Market Streets to the Airport Mail Facility at Lambert Field, which runs are made every hour of the day.

8. That the delay in the arrival of said parcel containing said copies of said motion was not due to willful delay or lack of diligence on the part of petitioner herein and that said petitioner had no control over the conditions heretofore set forth.

9. Petitioner states that grave injustice would be done him and due process of law denied him if this Honorable Court refused to permit him leave to file his said petition for rehearing out of time and that the court should and ought to permit petitioner to file said petition out of time or NUNC PRO TUNC so as to be within the time allowed by the rules of this court.

WHEREFORE the premises considered petitioner prays this Honorable Court to grant him leave to file his petition for rehearing of order denying petition for writ of certiorari out of time or in the alternative to file the same NUNC PRO TUNC.

Respectfully submitted,

HARVEY F. EUGE.

Subscribed and sworn to before me a notary public this ..... day of May, 1963.